Comcast Cablevision-Taylor *and* Local 4100, Communications Workers of America, AFL–CIO. Cases 7–CA–42054 and 7–RC–21365

April 30, 2003

SUPPLEMENTAL DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY MEMBERS LIEBMAN, WALSH, AND ACOSTA

On August 5, 1999, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act, in that the Respondent refused to recognize and bargain with the Union, and ordered that the Respondent cease and desist and take certain affirmative action to remedy the unfair labor practices.[1]

Thereafter, the Respondent petitioned the United States Court of Appeals for the Sixth Circuit for review of the Board's Order and the Board filed a cross-application for enforcement. The court, in its decision issued on November 14, 2000, granted the Respondent's petition for review and denied enforcement of the Board's Order.[2] For the reasons more fully set forth in the court's opinion, the court agreed with the Respondent's contention and found that the Union impermissibly interfered with the election by offering to employees, during the critical period, a free weekend trip to Chicago (which cost the Union approximately $50 for each of the employees who attended) on the weekend following the election. Accordingly, the court concluded that the Board erred in not setting aside the election held on August 27, 1998, which was won by the Union.

By letter dated March 20, 2001, the Board notified the parties that it accepted the court's opinion and would consider position statements on the Board's further processing of the underlying representation case. Neither party filed a position statement.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In light of the court's opinion, the sole issue before the Board is whether to direct a second election in the underlying representation proceeding, Case 7–RC–21365. The Board has reviewed the entire record in light of the court's decision, and has decided to reopen Case 7–RC–21365, set aside the election, revoke the certification of representative, and direct a second election.

[1] 328 NLRB No. 160 (1999) (not reported in Board volumes).

[2] *Comcast Cablevision-Taylor v. NLRB*, 232 F.3d 490 (6th Cir. 2000).

ORDER

Now, therefore, in view of the foregoing, the National Labor Relations Board

ORDERS that the Decision and Order in Case 7–CA–42054 is vacated.

IT IS FURTHER ORDERED, that Case 7–RC–21365 is reopened, the election is set aside, and the certification of representative is revoked.

IT IS FURTHER ORDERED, that Case 7–RC–21365 is remanded to the Regional Director for the purpose of conducting a second election as directed below.

[Direction of Second Election omitted from publication.]

MEMBER ACOSTA, concurring.

I concur with my colleagues' Supplemental Decision, Order and Direction of Second Election. Our decision today is in response to a decision by the Court of Appeals for the Sixth Circuit, which granted Respondent's petition for review and denied enforcement of the Board's prior Order. Our decision, however, does not address the potential inconsistencies in Board case law that formed the basis for the Court of Appeals' decision to deny enforcement. I write separately to highlight these issues.

In the present case, Respondent Comcast Cablevision-Taylor alleged that the Union influenced a representation election by announcing preelection that it would provide, on the weekend following the election, free transportation and 1 night's lodging in Chicago to employees who wished to attend a 2-hour meeting on cable industry issues hosted by the Union's parent organization. The employees, who worked in Taylor, Michigan, were to be driven to Chicago on Saturday morning; the meeting was scheduled for Sunday at 4 p.m. The cost for the trip was approximately $50 per employee. The Board overruled this objection and certified the Union. Comcast subsequently refused to bargain. The Board held that Comcast's refusal to bargain violated Section 8(a)(5) and (1) of the Act, and ordered Comcast to bargain. The Sixth Circuit declined to enforce this Order.

The Sixth Circuit observed that the Board previously has determined that union-conferred benefits far less substantial than the approximately $50 involved here were sufficiently valuable to be found objectionable. The Sixth Circuit, for example, cited *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984). There, the Board set aside an election in which the Union, on election day, had distributed to unit employees jackets worth $16 a piece. Distribution of the jackets had not been conditioned on a promise to vote for the Union, and only five or six employees actually had received a jacket before voting. The

objection was sustained, however, because the vote tally showed that their ballots could be determinative.

Our *Owens-Illinois* ruling likewise was cited by the Sixth Circuit in its decision to deny enforcement of a bargaining order in *NLRB v. Schrader's, Inc.,* 928 F.2d 194 (6th Cir. 1991). There, the employer objected to the Union's election-day distribution of hats and T-shirts, a fact pattern that the Sixth Circuit found indistinguishable from *Owens-Illinois.*[1]

In the present case, the *Owens-Illinois* ruling along with *Schrader's* once again form the basis for the Court of Appeals' denial of enforcement of a Board bargaining order: "If union hats, T-shirts, and jackets are considered sufficiently valuable to influence an employee's vote, then surely the offer of a free weekend trip to Chicago fits within this category." *Comcast Cablevision-Taylor v. NLRB,* 232 F.3d 490, 498 (6th Cir. 2000). Our Supplemental Decision, Order; and Direction of Second Election today is based on law of the case, and does not consider whether precedent inconsistent with *Owens-Illinois* remains good law, or, for that matter, whether *Owens-Illinois* remains good law.[2] This confusion may provide a basis for courts of appeals to deny enforcement in the future. The Board should address and reconcile case law on this issue.

[1] See also *Nestle Ice Cream Co. v. NLRB,* 46 F.3d 578 (6th Cir. 1995) (relying in part on *Owens-Illinois* to deny enforcement of a bargaining order).

[2] See *Broward County Health Corp.,* 320 NLRB 212, 213 fn. 7 (1995) ("Chairman Gould would not rely [on *Owens-Illinois*] because he believes that the opinion in that case does not withstand scrutiny.")